IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Lala Ram @ Jitendra Vs. State of Rajasthan
(D.B. Criminal Appeal No.409/2003)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 26-2-2003 in Sessions Case No.28/2002 (38/02) passed by Smt. Kamal Dutt, RHJS, Additional Sessions Judge (Fast Track) Alwar.

Date of Judgment: August 17, 2007.

PRESENT
HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. N.C. Chaudhary] for the appellant.
Mr. Vijay Chaudhary]

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

So close was the trap to the nest that Kalu Ram was caught unaware and done to death. Lala Ram @ Jitendra, appellant herein, and his brother Chhote Lal were indicted for committing murder of Lala Ram before learned Additional Sessions Judge (Fast Track) Alwar, who vide judgment dated February 26, 2003 did not find the charge against Chhote Lal established and acquitted him. The appellant was however convicted and sentenced as under:-

U/s.302 IPC:
To suffer life imprisonment and fine of Rs.5000/-, in default to further suffer rigorous imprisonment for one year.
U/s.3/25 Arms Act:
To suffer rigorous imprisonment for three years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for three months.
Substantive sentences were ordered to run concurrently.

2. The synopsis of the prosecution case can be narrated as follows:-

On December 19, 2001 around 2.30 PM while Kalu Ram (deceased) was at his home and his wife Suman was about to serve him lunch, Lala Ram (appellant) came on a motor cycle and persuaded Kalu Ram to immediately accompany him since there was some emergency. Kalu Ram leaving served food on the plate, accompanied Lala Ram. After a short while a boy of Vyas community came running and informed the wife of Kalu Ram that Kalu Ram was lying dead in the `Kothri' (store room) of Lala Ram. Wife of Kalu Ram then rushed to the Kothri and found dead body of Kalu Ram in a pool of blood on the floor whereas Katta (country made pistol) allegedly used in commission of offence, was lying on the cot. Information of the incident was communicated to Mool Chand, brother of the deceased, who was posted as Constable at Police Line Alwar. Mool Chand reached to the Police Station Malakhera (Alwar) and submitted written report (Ex.P-8) to SHO at 5 PM. On that report case under section 302 IPC was registered and investigation commenced. Autopsy on the dead body was performed, necessary memos were drawn, statements of witnesses were recorded, accused were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) Alwar. Charges under sections 302 IPC and 3/25 Arms Act were framed against the accused, who denied the charges and claimed trial. The prosecution in support of its case examined as may as 23 witnesses. In the explanation under Sec.313 CrPC, the accused claimed innocence. Two witnesses in support of defence were examined. Learned trial Judge on hearing final submissions while acquitting co-accused Chhote

Lal convicted and sentenced the appellant as indicated above.

3. We have heard rival submissions and weighed the material on record. A look at the impugned judgment demonstrates that learned trial court while convicting the appellant has placed implicit reliance on the following circumstances:-

(i) Deceased was last seen alive in the company of appellant.
(ii) Within half an hour thereafter dead body of deceased was found lying in a pool of blood in the Kothri belonging to appellant and his brothers.
(iii) Appellant did not give any explanation as to at which point of time, prior to the death of deceased, he got himself detached from the deceased.
(iv) Appellant also did not explain as to at which place he took the deceased on Motor Cycle and what was such urgency which forced him to persuade the deceased to accompany him.

4. Evidently, there is no ocular evidence and the case of the prosecution is based on circumstantial evidence. It is well settled that in order to convict a person on circumstantial evidence the circumstances must be fully established and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistence with the innocence of the accused.

5. Learned counsel for the appellant vigorously urged before us that the circumstances relied on by the prosecution have not been satisfactorily established and that in any event the circumstances said to be

established against the appellant do not provide a complete chain to bring home the guilt against the appellant. He vehemently submitted that since the report of the incident drawn by the villagers was torn by Constable Mool Chand (Pw.4), real brother of deceased, the fact of institution of report itself was shrouded in mystery. It was further canvassed that trial court committed illegality in ignoring the testimony of Rameshwar (Dw.1) who was an independent witness. It was also urged that the medical evidence gives rise to the presumption that the deceased might have committed suicide.

6. Learned counsel raised following questions before us:-

(i) Whether the death of deceased was homicidal in nature?
(ii) Whether there was any evidence of last seen, just before the incident?
(iii) Whether Lala Ram was the owner of the kothri?
(iv) Whether Lala Ram was in the exclusive possession of the said Kothri?
(v) Whether the weapon desi katta belonged to the appellant?
(vi) Whether it was possible to open fire at a distance of one feet to another person's face more specifically to the eye and the deceased person got no time to save his face?
(vii) Whether the chain of circumstances got broken in not lifting finger prints from the fire arm?
(viii) Whether the chain of circumstances got broken in not recovering the blood stained clothes and shoes of the appellant?
(ix) Whether the chain of circumstances got broken in absence of motive behind the incident?
(x) Whether there was any evidence of resistance by the

deceased?

(xi) Whether Section 106 Evidence Act could be pressed into service when other circumstances are not proved by the prosecution?

(xii) Whether the chain of circumstances was broken in not lifting moulds?

(xiii) Whether the chain of circumstances got broken in the absence of explanation of the heavy blood on the cot?

(xiv) Whether the incident was more suggestive of accidental death?

(xv) Whether the chain of circumstances got broken in not examining the boy of Vyas Community who informed about the incident to the wife of deceased?

(xvi) Whether the case of appellant is not distinguishable with that of the case of co-accused Chhote Lal?"

7. Having regard to the principles enunciated with regard to proof of guilt by circumstantial evidence, we shall now deal with the various circumstances said to be appearing against the appellant and at the same time examine the contentions advanced by the learned counsel for the appellant referred to above.

EVIDENCE OF LAST SEEN:

8. Coming to the circumstance that the deceased was last seen alive in the company of appellant we notice that the prosecution examined Suman (Pw.3), wife of deceased, Chando Devi (Pw.5) Bhabhi (sister-in-law) of the deceased and Pyari Devi (Pw.6) mother of deceased. Conjoint reading of the statements of these witnesses revealed that on the date of incident

around 2.30 PM while Kalu Ram was about to take food, the appellant and his brother Chhote Lal came on a motor cycle and created such a situation that Kalu Ram hurriedly accompanied them in a hunger state and within half an hour thereafter Kalu Ram was shot dead and his dead body was found in a pool of blood in the `Kothri' belonging to Lala Ram and his brothers. It was also stated by these witnesses that on hearing the message about the death of Kalu Ram when these witnesses went to the `Kothri' they found Lala Ram and Chhote Lal standing outside the Kothri. Testimony of these witnesses could not be shattered in the cross examination. Since in the police statement Ex.D-1 Suman stated that Lala Ram came alone on motor cycle, learned trial court gave benefit of doubt to Chhote Lal and acquitted him.

9. In order to appreciate the contention of learned counsel we have closely scrutinised the testimony of Mool Chand. It is no doubt true that Mool Chand was the brother of deceased and at the relevant time he was posted as Constable in Police Line Alwar, but this fact itself cannot be a ground to discard his testimony. Mool Chand in his cross examination deposed that he received information about the incident at 2.30 PM and within twenty minutes he reached to the police station Malakhera on motor cycle. Leaving motor cycle at police station he along with the SHO reached to the spot in a Jeep. Having carefully weighed the testimony of Mool Chand, we find that nothing helpful to the appellant could be extricated. Even Mool Chand was not cross examined on the issue that the villagers wrote the report of the incident and that Mool Chand torn it. Whatever Mool Chand did on hearing the news of murder of his brother was quite natural and it cannot be held that the report submitted by Mool Chand was shrouded in mystery.

10. Apart from the evidence of Suman, Chando Devi and Pyari Devi, there is yet another evidence of Desh Raj (Pw.17), who deposed that he had seen Lala Ram and Kalu Ram together on a motor cycle near a garden. He demanded some money from Kalu Ram for filling petrol on his motor cycle, but Kalu Ram expressed his inability. Lala Ram also had a talk with him but did not lend money. Desh Raj was casually cross examined and his testimony could not be shattered.

11. Learned counsel then contended that in the afternoon Kalu Ram was all alone and in order to support his contention learned counsel took us through the testimony of Lokesh Kumar Sharma (Pw.9), who deposed that from November,2001 to January,2002 he used to run `Halwai Shop'. On the date of incident in the afternoon Kalu Ram came to him on Hero Honda Motor Cycle and purchased sweet from him. At that time Kalu Ram was alone. Since from the testimony of Lokesh Kumar exact time at which Kalu Ram visited shop could not be established, we cannot infer that Kalu Ram went to the shop after 2.30 PM i.e., after he was taken by Lala Ram from his house.

12. It was next contended by learned counsel that lapse on the part of Investigating Agency in not lifting finger prints creates serious doubt about the genuineness of the prosecution case. Reliance is placed on Giriraj Vs. State of Rajasthan [2005(2) Cr.L.R. (Raj.) 1684], wherein this court found infirmity in prosecution evidence on the ground that finger prints were not taken before the Magistrate. It was observed as under:- (Para 9)

> "Coming to the circumstance that the finger prints of appellant were found at the place of incident, we notice that the learned trial Judge placed reliance on the testimony of Mahaveer

> Prasad, ASI (Pw.10), Pratap Singh (Pw.15), Shiv Lal, ASI (Pw.16) and Girdhari Singh, I.O. (Pw.21). A look at the evidence of these witnesses reveals that the finger prints of the appellant were found on a steel tumbler in the house of the deceased. The glass was seized, packeted and sealed and forwarded to Finger Print Bureau. The Finger Print Bureau gave its report with the opinion that the chance, finger prints, found on the steel tumbler were similar to and identical with specimen finger prints of the appellant. Girdhari Singh, IO (Pw.21) in his deposition stated that even though the Magistrate's Bunglaw was very near to the police station still the chance prints were not taken before the Magistrate. Girdhari Singh further deposed in the cross examination that `Gilas' (steel tumbler) was not shown to him in the court."

Ratio indicated in the aforequoted case is not applicable to the facts of instant case. Since Investigating Officer was not cross examined on this issue it is difficult for us to hold that act of not lifting the finger prints from the place of incident caused dent in the prosecution case.

13. In Raju @ Rajaram Vs. State of Rajasthan [2005(2) Cr.L.R. (Raj.) 1331] wherein it was held that where the dead body was found in front of the house of one of the accused, this fact itself is not sufficient to connect the accused with the offence.

14. In Ganpat Singh Vs. State of Rajasthan [2007(1) Cr.L.R. (Raj.) 20] the dead body was found in temple and the accused was seen coming out of the temple, in the facts and circumstances of that case benefit of doubt was granted to the accused.

15. In the instant case we notice that the time gap in between the point of time when the appellant and deceased were last seen alive and the

deceased was found dead is so small that possibility of any person other than the appellant being author of the crime becomes impossible. In Ramreddy Rajesh Khanna Reddy v. State of AP (2006)10 SCC 172, their Lordships of the Supreme Court indicated as under:- (Paras 27 & 28)

> "The last seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."
>
> (Emphasis Supplied)

16. In State of UP v. Satish (2005)3 SCC 114, the Apex Court observed thus:-

> "The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses Pws3 and 5, in addition to the evidence of PW.2"

HOMICIDAL DEATH:

17. It was next contended by learned counsel for the appellant that injury sustained by deceased was the result of suicide or accident. In order to appreciate the contention of learned counsel we carefully scanned the

postmortem report (Ex.P-40). According to which deceased sustained following antemortem injuries:-

> 1. There is lacerated wound ½ x 1½ cm, when a metallic probe passes it shows depth upto 18cm. There is presence of dried blood in the eye and in surrounding area of eye on cleaning the eye with mater there is collor of abrasion present surrounding the wound which is 1 mm in thickness. The wound is in centre of eye. All the structures of eye are damaged corresponding the wound sclera, lens, aqveous, humour, viterious humourm ratina all are damaged.
> Orbital bone in post aspect is fractured in 1 x 1cm area in full thickness of dissection of skull there is injury to Lt. cerebral hemisphare in Ant. & Inf. Part with meninges of 1 x 1cm lacerated wound. The wound tract passes upto post part in occipital region. IN tract there is unclotted blood present with subdural, blood about 200cc. Bullet is present in occipital region below the meninges in between brain and meninges.
> 2. There is also presence of blackening of Lt.eye which is due to sub cut collection of blood.
> The Range of weapon is about one feet.

In the opinion of Autopsy Surgeon Dr.Phool Singh Chaudhary (Pw.13) the cause of death was Coma due to injury to brain by fire arm.

18. Learned counsel placed before us extracts of Medical Jurisprudence to show the situation and character of the wound. To answer the question as to whether wounds were result of suicide, homicide or accident following points should be considered by a Medical Jurist:-

> (i) The situation and character of the wounds.
>
> (ii) The number, direction and extent of the wounds.
>
> (iii) The condition of the locality, the surroundings of the wounded person and the circumstances of the injury.

According to Medical Jurisprudence, suicidal wounds are usually on the front or on the sides of the body and affect the vital organs. They are usually incised, punctured or gunshot wounds. A suicidal firearm wound is usually a contact wound situated on the side of the temple, depending on which hand was used to shoot himself, in the centre of the forehead, the roof of the mouth, in the chest or epigastrium in front or the left side and sometimes under the chin. The firearm is usually fired at close range. A small weapon like a revolver or a pistol is held in the hand, while a rifle or a shot gun is supported on the ground or against the wall. Sometimes, the firing is done by pulling a string tied to the trigger by the big toe. The skin around the entry wound shows characteristic blackening, scorching and tattooing. In such cases the hand used to steady the weapon at the muzzle may be blackened and scorched and may also be stained with sqirting of the blood from the injured arteries.

19. A look at the testimony of Dr. Phool Singh Chaudhary (Pw.13) reveals that skin around the entry wound did not have characteristic blackening, scorching and tattooing. Even signs of suicidal death were not found on the hand of the deceased. Thus it cannot be observed that the injury sustained by the deceased was suicidal in nature and we hold that death of deceased was homicidal in nature.

DEAD BODY FOUND IN KOTHRI OF APPELLANT:

20. Gokul Ram (Pw.2) in his cross examination deposed that Lala Ram, Chhote Lal and Jagan along with their father came from the village Dayalpura as back as in 1977-78 and started residing in the village Kothri-ka-bas (Malakhera). Ganpat Ram (Pw.7), who was posted as Patwari in

village Malakhera, in his cross examination stated that the agricultural land bearing khasra No.1295 was entered in the name of Jag Mohan (brother of appellant) and there existed kothri adjacent to the said land. Jagdish Prasad Meena (Pw.16) deposed that the kothri, in which dead body of Kalu Ram was lying, belonged to Chhote Lal and Lala Ram. These witnesses were casually cross examined and their testimony could not be shattered in cross examination. Even in his explanation under section 313 CrPC the appellant did not assert that Kothri, from where dead body got recovered did not belong to him or belonged to someone else. Rameshwar (Dw.1), who was examined by the appellant as defence witness, in his cross examination deposed that Kothri belonged to Jag Mohan, who was the real brother of appellant. Rajesh Kumar (Dw.2) also stated that when he reached in front of Kothri of Jag Mohan, he heard shout of firearm. He then rushed to the Kothri and found the dead body lying on the floor. The prosecution thus is able to establish that Kothri, in which dead body of Kalu Ram was found, situated adjacent to the land bearing khasra No.1295, which was entered in the name of Jag Mohan, real brother of appellant. It is also established from the testimony of Suman (Pw.3) and Rameshwar (Dw.1) that when they reached to the Kothri, they saw appellant standing near the Kothri. The appellant did not give any explanation as to under what circumstances Lala Ram sustained gunshot injury and how he reached to the Kothri. The facts which were “especially” in the knowledge of appellant, could only be established by appellant himself. The appellant however did not choose to support any theory or hypothesis compatible with his innocence. In absence of explanation by the appellant, the only possible inference is that it was the appellant who committed the crime.

21. Section 106 is an exception to section 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are preeminently or exceptionally within his knowledge.

22. Their Lordships of the Supreme Court in Deo Nandan Vs. State (AIR 1955 SC 801) propounded that Section 106 of the Evidence Act although does not cast any burden upon the accused, but when the accused throws no light at all upon the facts which ought to be especially within his knowledge and which could support any theory or hypothesis compatible with his innocence, the court can also consider his failure to adduce any explanation. In the instant case after the prosecution established that appellants proceeded in the jeep with Chandan Singh, the appellants ought to have given explanation that could support any theory or hypothesis compatible with their innocence. In the absence of any other explanation by the appellants, the only possible inference is that it were the appellants who committed the crime.

(Emphasis Supplied)

23. Vivan Bose J. in Shambhu Nath Mehra Vs. State of Ajmer (1956 SCR 199) lays down the legal principle underlying the shifting of burden of proof under section 106 of the Evidence Act thus:- (Para 38)

> “This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are `especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.
>
> The word especially stress that, it means facts that are pre-eminently or exceptionally within his knowledge.”

24. From the evidence discussed herein above it is satisfactorily and conclusively proved that all the links in the chain are complete and do not suffer from any infirmity.

25. The aforementioned circumstances found to be established against the appellant form a complete chain of evidence as not to leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the appellant but on the contrary the same are conclusive nature consistent only with the hypothesis of the guilt of the appellant and conclusively lead to irresistible conclusion that it was the appellant and he alone had committed murder of Kalu Ram.

26. In the result the appeal preferred by the appellant fails and is hereby dismissed.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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